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No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE SOUTHLAND CORPORATION, RAY BERRY, TAL COLSON, KEITH JENKINS, ROBERT DUNCAN, JOHN P. THOMPSON, JERE W. THOMPSON, WALTON GRAYSON III, JOSEPH S. HARDIN, R G SMITH, EUGENE PENDER, S.R. DOLE, and TERRY DE BARD,

Petitioners,

v.

RICHARD D. and DARLA J. KEATING, MICHAEL M. and GLORIA G. COY, and HARRY BATTERSBY on behalf of themselves and all other persons similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COUNTY OF ALAMEDA, CALIFORNIA

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QUESTION PRESENTED

Whether the Federal Arbitration Act and the Supremacy Clause of the United States Constitution bar a state court from superimposing the state's statutes and procedures relating to class actions on a private arbitration of a commercial dispute involving interstate commerce.

PARTIES BELOW

This Petition involves three cases that were coordinated for pretrial purposes in the court below.* Plaintiff-respondents are the following former franchisees of 7-Eleven® convenience stores in California: Richard and Darla Keating, Harry Battersby, and Michael and Gloria Coy. These plaintiffs purport to represent a class consisting of all individuals who have owned 7-Eleven franchises in California at any time between May 1973 and the present.**

Defendants are The Southland Corporation, which owns the 7-Eleven® service mark, and several of its current and former officers, directors and employees: John P. Thompson, Jere W. Thompson, Walton Grayson III, Joseph S. Hardin, R G Smith, Eugene Pender, S.R. Dole,

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* The three cases are among a group of eight actions that were coordinated in the Superior Court for the County of Alameda, California, under the caption *Market Franchise Cases*, Judicial Council Coordination Proceeding No. 387. The three cases that are the subject of this Petition are: *Coy* v. *Southland*, Alameda County No. 506120-6; *Battersby* v. *Southland*, Santa Clara No. 390132; *Keating* v. *Southland*, Napa County No. 37402.

** The other five cases included in the *Market Franchise Cases* do not purport to be class actions and are not involved in this Petition. The plaintiffs in those five cases are Edward and Betty Gouveia, Patrick and Cathy Cheng, Phillip and Joan Newell, Thomas and Wanda Sampson, and Arthur and Jenny Scovis. All of these individuals are former franchisees of 7-Eleven stores in California.

Ray Berry, Tal Colson, Keith Jenkins, Robert Duncan, and Terry De Bard.

The Southland Corporation has no parent corporations or subsidiaries, other than wholly owned subsidiaries. Southland owns a 50% interest in CITGO Petroleum Corportation.***

*** Since this Petition challenges the constitutionality of California's class action law as applied in this litigation, 28 U.S.C. § 2403(b) may be applicable. Accordingly, Southland is serving a copy of this Petition on the Attorney General of California. *See* Sup. Ct. R. 28.4(c).

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IN THE

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OCTOBER TERM, 1987

No. 87-

THE SOUTHLAND CORPORATION, *et al.*,
Petitioners,

v.

RICHARD D. KEATING, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COUNTY OF ALAMEDA, CALIFORNIA

Petitioners, The Southland Corporation and several of its current and former officers, directors and employees (hereinafter collectively referred to as "Southland" or "petitioners"), seek a writ of certiorari to review an order entered by the Superior Court for the County of Alameda, California on June 26, 1987. The Supreme Court of California denied Southland's petition for review of that order, without opinion, on February 25, 1988.

At an earlier stage of this litigation, this Court noted probable jurisdiction to consider the issue presented here, but ultimately did not decide it. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). The Court remanded the litigation for further proceedings, but on remand the California courts acted contrary to this Court's mandate and did not address the issue.

OPINIONS BELOW

The June 26, 1987 order of the Superior Court of the County of Alameda, California, requiring the parties to arbitrate their disputes in a court-supervised class action arbitration, is unreported. That order, together with the Superior Court's accompanying Statement of Decision, is reprinted in the Appendix to this Petition at 1a-15a (hereinafter "App."). The orders of the California Court of Appeal and of the California Supreme Court, denying review of the class certification order, are not reported. These orders are reprinted at App. 16a, 17a and 19a.

This Court's decision in *Southland Corp.* v. *Keating*, *supra*, is reprinted at App. 75a-109a. In *Keating*, this Court reversed in part, and remanded for further proceedings, a decision of the California Supreme Court, *Keating* v. *Superior Court*, 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982). That decision is reprinted in the Appendix at 24a-74a.

JURISDICTION

The order that is the subject of this Petition was entered by the California Superior Court on June 26, 1987. Petitioners timely sought review of the order in the California Court of Appeal, but on December 16, 1987, that court dismissed the appeal and declined to review the order in a discretionary writ proceeding. (App. 16a-17a.) Petitioners then asked the California Supreme Court to review the class certification order, but, by order dated February 25, 1988, that Court declined to exercise its discretionary jurisdiction. (App. 19a.)

This Court has jurisdiction under 28 U.S.C. § 1257(3) (1982) because petitioners contended in the courts below that (i) a statute of the United States (*i.e.*, the Federal Arbitration Act) confers a right, privilege or immunity that protects them from the class action arbitration procedure mandated by the California courts, and (ii) Cali-

fornia's class action statute as applied to petitioners is invalid and preempted by the Federal Arbitration Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this Petition are as follows:

The Supremacy Clause, U.S. Const. art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 (1982)

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 382 of the California Code of Civil Procedure (West 1973)

> If the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracti-

cable to bring them all before the court, one or more may sue or defend for the benefit of all.

STATEMENT OF THE CASE

This litigation has a ten-year history, which includes a prior decision by this Court. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984). Yet the underlying merits of the parties' dispute still have not been reached. Southland has been fighting for a decade to enforce its arbitration agreement with the respondents, and plaintiff-respondents have been attempting to avoid arbitration altogether, or, in the alternative, to encumber it with extensive, judicially supervised procedures.

This Court held in *Keating* that the respondents could not avoid their arbitration agreement by relying on state laws and policies that favored a judicial forum. However, on remand they nonetheless managed to return the case to the judicial forum by persuading the California Superior Court to require the arbitration to proceed as a court-supervised class action. In so holding, the court refused to consider Southland's argument that this state-imposed procedure would violate the Supremacy Clause of the United States Constitution by impairing the exercise of rights protected by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982). The California court implicitly ruled that the California Supreme Court had already rejected Southland's preemption argument, even though this Court had held in *Keating* that "the state courts did not decide whether . . . state law imposing class-action procedures was preempted by federal law." 465 U.S. at 8.

In brief, the history of Southland's attempt to obtain the benefits of arbitration has been as follows:

In May 1977, Richard and Darla Keating sued Southland in the Superior Court for Santa Clara County, California. Plaintiffs were franchisees of a 7-Eleven convenience store. They alleged that their franchisor, Southland, had used an accounting system for their store that

was unfair and/or inaccurate and that Southland had made certain fraudulent representations to them concerning the accounting system. They asserted claims for common law fraud, breach of contract, breach of fiduciary duty and violation of the California Franchise Investment Law.[1] Plaintiffs purported to represent a class of all individuals who have owned 7-Eleven franchises in California at any time since May 1973. Thereafter, the other respondents filed similar complaints, and the actions were coordinated for pretrial proceedings in the Superior Court for Alameda County.

The franchise agreements provided that "[a]ny controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . ." *See* 465 U.S. at 4. Nevertheless, plaintiffs resisted arbitration and, as a fallback position, suggested that if their claims were arbitrable, the court should create a procedure whereby the arbitration would be conducted as a court-supervised class action.

The California Superior Court, by orders entered in February and July 1978, generally upheld the arbitration agreement, except with regard to the statutory claim under the Franchise Investment Law. The court did not decide whether the arbitration should proceed as a class action.

In August 1980, the California Court of Appeal reversed the ruling that the arbitration agreement was unenforceable with respect to claims under the Franchise Investment Law. *Keating* v. *Superior Court*, 109 Cal. App. 3d 784, 167 Cal. Rptr. 481 (1980). The court also held, however, that there is no "insurmountable obstacle"

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[1] The California Franchise Investment Law requires franchisors to make certain disclosures to prospective franchisees, and prohibits franchisors from making fraudulent or misleading statements to prospective franchisees. *See* Cal. Corp. Code § 31000 *et seq.* (West 1977).

to conducting an arbitration on a class-wide basis, and it remanded the litigation to the trial court for class certification proceedings. 167 Cal. Rptr. at 492.

Southland then petitioned the California Supreme Court to review the class action ruling. Plaintiffs cross-petitioned for review of the Court of Appeal's decision on the arbitrability of the statutory claims. The California Supreme Court, by a divided vote of 4-2, affirmed the Court of Appeal's ruling on the availability of a class action arbitration procedure and reversed the ruling that claims asserted under the California Franchise Investment Law are arbitrable. *Keating* v. *Superior Court*, 31 Cal.3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 (1982). The court remanded for a determination whether a class action would be appropriate in these particular cases.

On appeal to this Court, Southland argued that the Federal Arbitration Act preempted the California Franchise Investment Law to the extent that it permitted parties to interstate contracts containing arbitration clauses to sue in court. This Court agreed. *Keating*, *supra*, 465 U.S. at 10-16. The Court also noted probable jurisdiction over the issue whether the Federal Arbitration Act barred the states from superimposing class action policies and procedures on arbitration agreements. However, plaintiffs contended before this Court that the class action issue had been decided "solely in terms of state law" in the California courts and that the Court therefore lacked jurisdiction to decide the federal preemption question.[2] This Court agreed and found that it therefore did not have jurisdiction to consider the issue. *Id.* at 9. It remanded the class action arbitration issue to the California courts for further proceedings. *Id.* at 17.

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[2] Brief for Appellees at 13, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) (Docket No. 82-500). *See also* Respondents' Motion to Dismiss at 6, *id.*

Following remand in 1984, the plaintiffs amended their complaints and undertook extensive discovery, purportedly addressed to the class action question. The parties thereafter filed extensive briefs and evidentiary submissions. Southland specifically argued, among other things, that a class action arbitration would be preempted by federal law.[3] In response, plaintiffs contradicted what they had represented to this Court, arguing that the California Supreme Court had implicitly rejected Southland's preemption argument in its 1982 opinion.[4]

After oral argument, the Superior Court ruled in a one-page minute order that all of plaintiffs' claims were appropriate for class treatment in arbitration.[5] The order did not address preemption. Plaintiffs then submitted a proposed Order, Statement of Decision and Notice to the class. On June 19, 1987, the Superior Court issued another minute order, adopting without changes plaintiffs' submissions.[6] The court signed these papers on June 26, 1987. In accordance with plaintiffs' position, the Statement of Decision recited that the "law of the case" and "invited error" doctrines barred Southland from

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[3] *See* Memorandum of Defendant The Southland Corporation In Opposition to Plaintiffs' Motion for Class Certification at 32-45, *Market Franchise Cases*, Judicial Council Coordination Proceeding No. 387 (Superior Court of California, County of Alameda, class certified June 26, 1987).

[4] *See* Plaintiffs' Reply to Defendant's Opposition to Motion for Class Certification at 4, *id.*

[5] Order of Court re Motion for Class Certification, *Market Franchise Cases*, Judicial Council Coordination Proceeding No. 387 (California Superior Court, County of Alameda, November 10, 1986).

[6] Order of Court, *Market Franchise Cases*, Judicial Council Coordination Proceeding No. 387 (California Superior Court, County of Alameda, June 19, 1987).

raising the preemption issue. In essence, plaintiffs had convinced this Court not to review the issue in 1984 because the question *had not been* decided by the California Supreme Court, and thereafter convinced the Superior Court not to review the issue because it *had been* previously decided by the state supreme court.

Southland attempted to appeal to the California Court of Appeal and, in the alternative, to obtain a writ of mandamus or prohibition. Southland's appellate papers specifically contended that the Superior Court's class certification order was inconsistent with and preempted by the Federal Arbitration Act. However, on December 16, 1987, the Court of Appeal dismissed the appeal and denied the writ petition without opinion. (App. 16a-17a.)

Finally, Southland filed a petition for review in the California Supreme Court. Again, Southland urged reversal of the class certification on the basis of the federal constitutional issue. Review by the California Supreme Court is wholly discretionary, and, on February 25, 1988, the court declined to exercise its jurisdiction. (App. 19a.)

On March 24, 1988, Southland filed a motion in the Superior Court to stay the class action until Southland had filed, and this Court had considered, a petition for a writ of certiorari. On March 29, the case was remitted from the Court of Appeal to the Superior Court, vesting jurisdiction once again in the Superior Court. On the same day, the court stayed its class action order until April 20, 1988 in order to give Southland an opportunity to petition this Court for a stay. On April 15, Southland applied to Justice O'Connor for a stay pending consideration of this Petition and, if the Petition is granted, pending the Court's decision on the merits.

REASONS FOR GRANTING THE WRIT

The issue presented in this Petition warrants full review by this Court. The issue might have been resolved in *Keating* in 1984 but for respondents' successful contention that the California courts had not yet considered it. On remand, respondents avoided the merits again by contradicting the position they had taken in this Court. The Court should not allow its procedures to be manipulated in this fashion and should resolve the federal preemption issue once and for all.

A. The Court Has Jurisdiction

In the recent proceedings in the Superior Court on Southland's motion for a stay, respondents did not dispute that the preemption issue poses a substantial federal question, but they advanced several reasons why this Court allegedly is divested of jurisdiction. Those arguments are addressed at the outset.

1. *The Superior Court's order is a final judgment or decree rendered by the highest court of a state in which a decision could be had.*

This Court's jurisdiction requires the existence of a "[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had . . . ." 28 U.S.C. § 1257 (1982). Respondents apparently contend that the Court lacks jurisdiction because the order at issue was entered by a trial court rather than the California Supreme Court and because the litigation is not at an end.

The fact that the California appellate courts have declined to review the trial court's order does not deprive this Court of jurisdiction. An order is rendered by "the highest court of the State in which a decision could be had" if the petitioner has attempted to obtain review in the highest court available. *Minneapolis St. P. & S. Ste.*

M. Ry. v. *Rock*, 279 U.S. 410, 411-12 (1929); *see also Virginian Ry.* v. *Mullens*, 271 U.S. 220, 222 (1926). If petitioner has done so, neither the state supreme court's disclamation of its discretionary jurisdiction, nor the possibility of review of the order at a later stage of the litigation, deprives this Court of jurisdiction. *See, e.g., Perry* v. *Thomas*, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (review of decision of California Court of Appeal, where California Supreme Court had denied discretionary review, even though the California Supreme Court could review arbitrability issue at later stage of litigation); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-98 n.5 (1983); *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971).

Nor is finality lacking because the overall litigation is at an "interlocutory" stage. This Court employs an "intensely 'practical' approach" to the finality requirements of 28 U.S.C. §§ 1257 and 1291. *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976) (citations omitted). Determinations of finality must balance " 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.' " *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (citation omitted). Under this test, the Court has frequently reviewed decisions that deny or burden arbitration, *Southland Corp.* v. *Keating*, *supra*; *Perry* v. *Thomas*, *supra*; *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983), as well as decisions that raise important questions concerning class action procedures. *E.g., Eisen* v. *Carlisle & Jacquelin*, *supra*.

As this Court recognized in *Keating*, the "core purpose of a contract to arbitrate" would be defeated if the state court litigation had to run its course before important federal issues concerning arbitrability could be resolved. 465 U.S. at 7-8. To force Southland to endure a lengthy, complex, judicially supervised class action before the preemption issue is decided would deprive the com-

pany of the very rights the Federal Arbitration Act protects. Because the class action ruling threatens to erode federal policy, and because reversal of the state court on the federal issue would end the state court's proceedings, this Court has jurisdiction. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-83 (1975).

2. *The federal question was properly raised in the California courts.*

As noted, when this case was previously before this Court, respondents argued, and the Court agreed, that this Court could not consider the question whether California's class action procedures were preempted by federal law because the California appellate courts had not decided the question.[7] This Court remanded to the California courts for further proceedings on the issue. 465 U.S. at 17.

Following remand, respondents did a 180-degree turn. They argued that although the California Supreme Court had not "expressly" decided the preemption issue in the prior appeal, it had "implicitly" decided it because the issue was "essential to the [California Supreme Court's] decision."[8] The Superior Court apparently agreed, for it did not address the question whether a class action arbitration is consistent with the Federal Arbitration Act. It executed an order, in the form submitted by respondents, reciting that consideration of the preemption question is barred by the "law of the case" and "invited

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[7] Plaintiffs represented that the preemption question "was neither raised nor decided below" and that "the state courts decided the issue solely in terms of state law." Respondents' Motion to Dismiss at 6, *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) (No. 82-500); Brief of Appellees at 13, *id.*

[8] Reply to Defendant's Opposition to Motion for Class Certification at 4, *Market Franchise Cases*, Judicial Council Coordination Proceeding No. 387 (California Superior Court, County of Alameda, class certified June 26, 1987).

error" doctrines. We anticipate that respondents will now attempt to complete their ruse by arguing that this Court lacks jurisdiction because the class action issue was decided in the court below on state-law grounds, without reaching the federal issue.[9]

Under California law, the "law of the case" doctrine applies to questions presented and decided at an earlier stage of the proceedings. *See, e.g., In re Estate of Horman*, 5 Cal. 3d 62, 73, 95 Cal. Rptr. 433, 441, 485 P.2d 785 (1971), *cert. denied*, 404 U.S. 1015 (1972). It does not apply to issues that might have been, but were not, decided. *Id.; see also Di Genova* v. *State Board of Educ.*, 57 Cal. 2d 167, 18 Cal. Rptr. 369, 367 P.2d 865, 871 (1962). Similarly, the "invited error" doctrine does not bar parties from raising new legal issues or from changing their legal arguments to remedy an error of law made at an earlier stage of the proceedings. *See Ward* v. *Taggart*, 51 Cal. 2d 736, 336 P.2d 534, 537-38 (1959); *Flores* v. *Natividad Medical Center*, 192 Cal. App. 3d 1106, 238 Cal. Rptr. 24, 30-31 (1987); *County of Madera* v. *Superior Court*, 39 Cal. App. 3d 665, 674 n.7, 114 Cal. Rptr. 283, 289 n.7 (1974). California law generally permits parties to raise any new defense following reversal and remand to the trial court. 9B Witkin, *California Procedure*, Appeal § 627, at 608 (3d ed. 1985).[10]

In the instant case, plaintiffs represented to this Court that the California appellate courts had not decided the federal preemption issue. If so, the California "law of

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[9] Respondents so argued in the court below. Plaintiffs' Memorandum in Opposition to Defendants' Motion for a Stay at 2-4, *Market Franchise Cases*, Judicial Council Coordination Proceeding No. 387 (California Superior Court, County of Alameda, class certified June 26, 1987).

[10] *See, e.g., Western Air Lines, Inc.* v. *Schutzbank*, 258 Cal. App. 2d 218, 66 Cal. Rptr. 293, 297, 300 (1968); *Steelduct Co.* v. *Henger-Seltzer Co.*, 26 Cal. 2d 634, 160 P.2d 804, 809 (1945); *Ellis* v. *Witmer*, 148 Cal. 528, 83 P. 800 (1906).

the case" doctrine does not apply, and this Court has jurisdiction under 28 U.S.C. § 1257. On the other hand, if plaintiffs' current position is the correct one—*i.e.*, if the California Supreme Court *did* decide the preemption issue in the earlier appeal—then this Court again has jurisdiction under Section 1257, which embraces any federal issue that was decided at any stage of the state court proceedings, even if it has become "law of the case." *See, e.g., Hathorn* v. *Lovorn*, 457 U.S. 255, 261-62 (1982); *Reece* v. *Georgia*, 350 U.S. 85, 87 (1955). Therefore, if plaintiffs are now suggesting that the California appellate courts implicitly rejected Southland's preemption argument in the earlier appeals, this Court has jurisdiction, notwithstanding California's "law of the case" doctrine. *See, e.g., Yazoo & Mississippi Valley Ry.* v. *Adams*, 180 U.S. 1, 9, 13-15 (1901). Respondents cannot have it both ways.

Furthermore, state-law doctrines such as "law of the case" and "invited error" cannot be invoked as a bar to review by this Court unless their application in the case at bar is consistent with the "strict[] and regular[]" practice of the state courts. *See, e.g., Hathorn* v. *Lovorn*, *supra*, 457 U.S. at 262-65.[11] In adopting plaintiffs' arguments, the Superior Court applied the doctrines in a manner that goes well beyond the normal bounds of those doctrines, for it applied them to pure questions of law and to issues that were not previously addressed.[12]

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[11] In California, the law of the case doctrine is applied as a discretionary rule rather than a jurisdictional requirement. *Judson* v. *Herrington*, 71 Cal. App. 2d 565, 566, 162 P.2d 931, 932 (1945); *see Vangel* v. *Vangel*, 45 Cal. 2d 804, 810, 291 P.2d 25, 28 (1955). In such situations, a state procedural rule does not defeat this Court's jurisdiction. *See Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 232-34 (1969).

[12] In addition to being inapplicable for the reasons discussed above, the California law of the case doctrine is inapplicable where, as here, intervening cases have changed or significantly clarified the governing law. *Subsequent Injuries Fund* v. *Industrial Accident Comm'n*, 53 Cal. 2d 392, 395, 1 Cal. Rptr. 833, 835, 348 P.2d 193

There is one issue that clearly *has* become law of the case: namely, this Court's ruling that the federal preemption issue was not considered in the earlier appeals. That being so, the California Superior Court was not free on remand to apply judicial doctrines that come into play only when an issue has been previously considered,[13] and this Court's jurisdiction cannot be defeated by the invocation of such doctrines.

B. The Question Merits Review by This Court

In recent years, this Court has held that the Federal Arbitration Act embodies a strong federal policy favoring enforcement of agreements to arbitrate disputes outside the judicial system. *See Perry* v. *Thomas*, *supra*; *Shearson/American Express, Inc.* v. *McMahon*, 107 S. Ct. 2332, 96 L. Ed.2d 185 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985); *Southland Corp.* v. *Keating*, *supra*; *Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, *supra*. The Court has ruled that Congress intended to establish a substantive right applicable to all contracts involving interstate commerce. *Southland Corp.* v. *Keating*, *supra*, 465 U.S. at 10-16. It has held that the Act preempts any state statutes or doctrines that override arbitration agreements. *Moses H. Cone Memorial Hosp.*, *supra*, 460 U.S. at 24. Two of these cases—*Southland Corp.* v. *Keating* and *Perry* v. *Thomas*—involved situations in which California courts had upheld state laws in the face of federal preemption arguments.

(1960); *Standard Oil Co.* v. *Johnson*, 56 Cal. App. 2d 411, 132 P.2d 910 (1942).

[13] *See Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978); *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Moreover, having argued to this Court that the California courts had not addressed the federal question, the plaintiffs were not free to change their position on the facts on remand. *See NAACP* v. *Alabama ex rel Patterson*, 360 U.S. 240, 243-44 (1958).

The decision of the court below nominally upholds the parties' agreement to arbitrate, but it undermines this Court's recent decisions as effectively as if arbitration had been denied altogether. The procedure mandated by the Superior Court's order, and by the 1982 decision of the California Supreme Court at an earlier stage of this litigation, is a *judicial* procedure. The class certification decision must be made by a court. *Keating, supra*, 31 Cal. 3d at 613, 183 Cal. Rptr. at 377, 645 P.2d at 1209. Discovery, briefing and hearings are generally required before the class issue can be decided,[14] and these proceedings are often complex and time-consuming. In the instant case, judicial discovery procedures were used extensively, and three-and-one-half years elapsed between this Court's decision in January 1984 and the Superior Court's class certification in June 1987. Southland's rights under the Federal Arbitration Act already have been substantially impaired.

And judicial involvement is far from over. The procedure established by the California courts contemplates that the judiciary will determine the form of notice to the class; supervise the notice and opt-out procedure; and review any proposed dismissal or settlement. *Keating, supra*, 31 Cal. 3d at 613, 183 Cal. Rptr. at 377, 645 P.2d at 1209.[15] Moreover, with respect to the arbitration itself, the California Supreme Court recognized that the Superior Court would be required to exercise "a measure of external supervision in order to safeguard the rights of absent class members to adequate representa-

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[14] Class determinations involve considerations enmeshed in the factual and legal issues comprising plaintiffs' causes of action. *General Telephone Co.* v. *Falcon*, 457 U.S. 147, 160 (1982); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 n.12 (1978).

[15] In the case at bar, the Superior Court's order provides that the notice will be sent on the court's stationery, that class members will have 60 days to opt out or else be included in the class, and that, after the initial notice, the court will consider whether further notices are required. (App. 2a-3a.)

tion . . . ." *Id.* This oversight would be pervasive, because, as this Court has held, considerations of due process require active judicial involvement in all aspects of class actions.[16]

Further, class arbitration threatens to involve the judiciary in the actual merits of the parties' dispute. The Superior Court has directed the arbitrators to conduct the proceedings in conformity with its Statement of Decision on the class action issue. (App. 4a.) Among other things, that decision contains several statements concerning the admissibility of evidence and the elements of plaintiffs' claims, some of which Southland contends are erroneous as a matter of law. If the arbitrators feel constrained to abide by the Superior Court's statements, their authority will be directly impaired.[17]

Southland's position is that the procedures mandated by the California courts are the antithesis of what arbitration is supposed to entail. Arbitration is intended to be quick, informal, simple, inexpensive, private and, most of all, nonjudicial. Class actions, by their nature, are time-consuming, formalized, complex, expensive, public and judicially supervised. The procedure created by the California courts would be an arbitration in name

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[16] *See Eisen* v. *Carlisle & Jacquelin, supra,* 417 U.S. at 173-74. After a court has made an initial determination that the evidence is likely to be common to the class and that the claimants will adequately represent the class, it must continually reevaluate the situation as the case proceeds. If this is not done, and if the evidence actually presented is not applicable to the class as a whole, the judgment will not be binding on absent class members. *See General Telephone Co.* v. *Falcon, supra.*

[17] A fundamental aspect of arbitration is that the arbitrators have the authority to decide what evidence to consider, as well as to decide the merits of the case, without strict adherence to judicial rules of evidence or judicial case law. *See Lentine* v. *Fundaro,* 29 N.Y.2d 382, 328 N.Y.S.2d 418, 421, 278 N.E.2d 633 (1972); Domke, *Domke on Commercial Arbitration,* § 24.02 at 364, § 25.05 at 396-97 (Rev. ed. 1984).

only. In all other respects, it would be a two-forum, judicial monstrosity that would be more complex than if the case were in court for all purposes. Southland's position, therefore, is that the procedure poses "an obstacle to the full effectiveness of a federal statute" and is therefore invalid under article VI, clause 2 of the Constitution. *See Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 722 (1963).

This Court has stated that an agreement to arbitrate is "a specialized kind of forum-selection clause that posits not only the situs of suit but also *the procedure* to be used . . ."; [18] that "the unmistakably clear congressional purpose [is] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts"; [19] and that the Federal Arbitration Act calls upon the courts to move the parties to an arbitrable dispute "out of court and into arbitration as quickly and easily as possible." [20] The Court has emphasized that when parties have contracted to arbitrate, the courts must strictly enforce the agreement, even if some other procedure seems to be more efficient or more fair.[21]

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[18] *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (emphasis added).

[19] *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

[20] *Moses H. Cone Memorial Hosp., supra*, 460 U.S. at 22.

[21] *Dean Witter Reynolds, Inc.* v. *Byrd, supra*, 470 U.S. at 216-21. The California Supreme Court based its decision on its view that it might be unfair in some situations to allow an arbitration agreement to defeat California's public policy favoring class actions. *Keating* v. *Superior Court, supra*, 31 Cal. 3d at 609, 183 Cal. Rptr. at 374-75. Under this Court's decisions, this was not an appropriate consideration. In any event, the California court overlooked the fact that the objectives of class actions (reducing the cost of prosecuting individual claims; relieving burdens on the courts) are served by arbitration as well. Arbitration assists the administration of justice by consensually removing cases from the often

Decisions by the California courts imposing class action arbitration [22] are inherently in conflict with rulings by other courts that the Federal Arbitration Act requires persons who have executed arbitration agreements to be excluded from judicial class actions.[23] Furthermore, the implications of the California court's decision go beyond the question of class actions. If state courts can nominally uphold arbitration agreements while wrapping them in complex judicial procedures, the right to arbitrate will be a hollow one. The purposes of the Federal Arbitration Act can be defeated as effectively by judicial control as by doctrines that override arbitration altogether. The case at bar therefore merits review by this Court in order to resolve the important question whether states are entitled to overlay interstate arbitration contracts with judicial procedures.[24]

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tortuous route of the judicial system and by providing a quick, inexpensive remedy to facilitate the prosecution of claims—particularly small ones.

[22] Subsequent to the California Supreme Court's 1982 decision in this case, California courts have followed that decision and have imposed class action procedures in other cases. *Izzy* v. *Mesquite Country Club*, 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315 (1986); *Gainey* v. *Occidental Land Research*, 186 Cal. App. 3d 1051, 231 Cal. Rptr. 249 (1986); *Lewis* v. *Prudential Bache Securities*, 179 Cal. App. 3d 935, 225 Cal. Rptr. 69 (1986).

[23] *See, e.g., Sanders* v. *Robinson Humphrey/American Express, Inc.*, 634 F. Supp. 1048, 1064-65 (N.D. Ga. 1986), *aff'd in relevant part sub nom. Kirkpatrick* v. *J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987), *cert. denied*, 99 L. Ed. 2d 421 (1988); *cf. Steinberg* v. *Prudential-Bache Securities, Inc.*, No. 8173 (Del. Ch. April 30, 1986) (Available on LEXIS: States Library, Del. File).

[24] There are many contexts in which state legislatures or courts might be tempted to impose judicial procedures on arbitration (*e.g.*, discovery rules, the rules of evidence). For example, there is "a dynamic state of conflict," *Higley South, Inc.* v. *Park Shore Dev. Co.*, 494 So. 2d 227, 229 (Fla. Dist. Ct. App. 1986), concerning the question whether a court may order two separate arbitrations to

CONCLUSION

For the reasons stated, petitioners The Southland Corporation, *et al.* request that a writ of certiorari be issued to the Superior Court of the County of Alameda, California, to review that court's decision and order of June 26, 1987.

Respectfully submitted,

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be consolidated, thereby altering the procedures specified in the individual arbitration agreements. *Compare Cable Belt Conveyors, Inc.* v. *Alumina Partners of Jamaica*, 669 F. Supp. 577 (S.D.N.Y. 1987), *aff'd mem.*, No. 87-7215 (2d Cir., May 20, 1987), *cert. denied*, 108 S. Ct. 161, 98 L. Ed. 2d 116 (1987) and *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 572 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) *with Del E. Webb Constr.* v. *Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987); and *Weyerhaeuser Co.* v. *Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984).